SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reason for Granting the Writ	5
Conclusion	10
Appendix	1a
Opinion	1a
Judgment	8a
Modified Judgment	9a

TABLE OF CASES

Aberly v. *Craven County*, 70 F. 2d 52 (4th Cir., 1934)	6
Anderson v. *Atherton*, 302 U.S. 643 (1937)	7
Century Distilling Co. v. *Continental Distilling Co.*, 106 F. 2d 486 (3rd Cir. 1939)	7
Commercial National Bank in Shreveport v. *Parsons*, 144 F. 2d 231 (5th Cir. 1944)	7
Commissioner of Internal Revenue v. *Kelly's Estate*, 84 F. 2d 958 (7th Cir. 1936)	6
Corning v. *Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853)	6
Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1938)	6
Harding v. *Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929)	6
In Re Schwartz, 89 F. 2d 172 (2nd Cir. 1937)	6
Langnes v. *Green*, 282 U.S. 531 (1931)	6
Lanova Corp. v. *National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940)	6, 7
Lindheimer v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934)	6
Mach v. *Abbott Co.*, 136 F. 2d 7 (8th Cir. 1943), *cert.* den. 320 U.S. 773	6

Page

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 8, 9
Morley Constr. Co. v. *Maryland C. Co.*, 300 U.S. 185 (1937) 7
Ottenheimer Bros. v. *Libuwitz*, 74 F. 2d 858 (4th Cir. 1935), *cert.* den. 296 U.S. 582 6
Partmar Corp. v. *Paramount Theatres Corp.*, 347 U.S. 89 (1954) 6
Standard Accident Insurance Co. v. *Roberts*, 132 F. 2d 794 (8th Cir. 1942) 7
United Engineering and Foundry Co. v. *Cold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), *cert.* den. 291 U.S. 675 6
United States v. *Adamant Co.*, 197 F. 2d 1 (9th Cir. 1952), *cert.* den. 344 U.S. 903 (1952) 6
United States v. *American Railway Express Co.*, 265 U.S. 425 (1924) 7
Watchmaker v. *Barnes*, 259 Fed. 783 (1st Cir. 1919) .. 9
Zartman v. *First Nat. Bank*, 216 U.S. 134 (1910) 9

IN THE

Supreme Court of the United States

October Term, 1955

No.

ROBERT W. JAFFKE, *Petitioner,*

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert W. Jaffke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 13, 1956, as amended February 13, 1956.

OPINION BELOW

The opinion of the Court of Appeals, printed at page 1a of the Appendix hereto, has not as yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1956, and amended February 13, 1956. The jurisdiction of this Court was invoked under 28 U.S.C. section 1254.

QUESTIONS PRESENTED

Where the losing party in the district court (Respondent) appeals to the Court of Appeals, and the prevailing party (Petitioner) took no cross appeal from adverse evidentiary rulings by the district court, did the appellate court err in reversing the judgment and ordering judgment for appellant, holding certain findings unsupported by evidence, refusing to consider, because no cross appeal was taken, evidence supporting such findings adduced by Petitioner but stricken by the trial court?

Where a federal district court, sitting as a bankruptcy court, adjudges a bankrupt in contempt and sentences him to jail for non-compliance with a turn-over order, but the bankrupt is released from imprisonment on numerous occasions over a two year period to locate money to comply with the turn-over order, and the bankrupt fraudulently obtains money from an innocent third party and pays it to the Trustee in Bankruptcy to purchase his freedom, does the Trustee in Bankruptcy as an officer of the court have the duty to investigate the source of such payments?

STATEMENT

This case had its genesis on October 21, 1948, when Robert L. Knetzer was adjudged a bankrupt by the United States District Court for the Southern District of Illinois. (R. 165). He had liabilities of $3,844,000.

(R. 165). Subsequently, William C. Dunham (Respondent here) was appointed Trustee of the Bankrupt's Estate. (R. 76). On July 11, 1949, the district court, sitting in bankruptcy, entered a "turn-over order" directing the Bankrupt, Knetzer to pay over to the Trustee $250,000, which the court found was the amount of assets concealed by the Bankrupt (R. 144). On December 1, 1949, the Bankrupt was found guilty of contempt of court for failing to comply with the "turn-over order" and remanded to jail on March 28, 1950. (R. 165). He was released from confinement, however, on numerous occasions during the period December 1, 1949 to February 13, 1952 upon his undertaking to locate assets sufficient to comply with the "turn-over order" and purge himself of contempt. (R. 85, 166). In fact his freedom on several occasions was requested by Respondent. (R. 85). The Bankrupt after these excursions from custody would make payments to Respondent, in effect buying further freedom from imprisonment. (R. 77-82). Respondent made no inquiry respecting the source of the payments (R. 87).

Several times when the Bankrupt was out of jail he contacted Petitioner (Plaintiff below) which contacts resulted in payments by Petitioner to the Bankrupt in the sum of $47,980 during a period from December 7, 1950 to October 23, 1951. As the district court found, which finding was affirmed on appeal, the Bankrupt had defrauded Petitioner of these sums. (R. 166).

Upon discovering the fraud of Bankrupt, Petitioner filed a reclamation petition against the Bankrupt and the Trustee in Bankruptcy (Respondent), seeking a return of the monies fraudulently extracted from him (R. 3). Prior to the summary proceeding in the dis-

trict court on Petitioner's reclamation petition the Bankrupt died, and the petition was successfully prosecuted against the Respondent, resulting in a verdict in favor of Petitioner in the amount of $27,400. (R. 167). It was the finding of the lower court that the Bankrupt had defrauded Petitioner of $27,400, which money had been turned over to Respondent in purported compliance with the "turn-over order." (R. 166-167).

Additionally, the trial court made certain rulings on evidence tendered by Petitioner and struck from the record certain of such evidence, including a statement by the Bankrupt, in affidavit form, that he had turned over to the Trustee (Respondent) $36,000 which he had obtained from Petitioner. (R. 167).

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, contending that there was no substantial evidence to sustain the findings of the district court that the money which the Bankrupt had defrauded from Petitioner had, in fact, been paid over to Respondent, Trustee. The appellate court sustained this contention. The court, however, expressly refused in weighing the evidence to consider the ruling of the trial court striking the statement of the Bankrupt under oath that he had in fact paid $36,000 of the monies defrauded from Petitioner to Respondent. As basis for this refusal, the court stated:

> "There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case."

The court of appeals reversed and remanded the case for further proceedings before the trial court, but upon a petition by Respondent modified the judgment to re-

quire the district court to enter judgment for Respondent.

REASONS FOR GRANTING THE WRIT

A. The Nature of Cross-Appeals

This Court should grant this Petition not only because of the impact of the decision below on appellate practice, but also because the decision is in conflict not only with decisions of other circuits but also of this Court.

The effect of the decision sought to be reviewed upon orderly appellate procedures may not be minimized. The court of appeals has established a rule that when the losing party in the district court appeals the winning party in the district court, at penalty of waiver, is required to cross appeal all rulings of the trial court with which he takes issue including rulings on evidence. This is contrary to established law that only a party aggrieved may appeal. Placing this burden on the prevailing party will, if carried to the only logical conclusion, change appellate review into proceedings more in the nature of appellate trials *de novo*.

For, complying with the appellate decision in this case, careful practitioners who represent the prevailing litigant will cross appeal every trial court decision where, during the trial, adverse rulings have been made. The effect is patent. The record on appeal will be more voluminous—a necessity where both the successful and unsuccessful litigants must present the arguments important to their respective cases. Appellate briefs must be expanded to accommodate arguments on *all* the rulings of the trial court, not just those which aggrieve the losing party. Thus, instead of a desirable focusing of issues in the appellate court,

there is accumulated a mass of issues, many of which, in cases of affirmance, are irrelevant.

The refusal of the appellate court to review the evidentiary rulings adverse to the prevailing party is in conflict with decisions of this and circuit courts. Petitioner was victorious in the district court. The findings of fact* of the district court as was the decree, were favorable to Petitioner. Other circuit courts of appeal as well as this Court have held, contrary to the decision here sought to be reviewed, that Petitioner in these circumstances is barred from taking any appeal or cross appeal from the decision of the district court. *Harding* v. *Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929); *In re Schwartz*, 89 F. 2d 172 (2nd Cir. 1937); *Lanova Corp.* v. *National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940); *United Engineering and Foundry Co.* v. *Gold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), *cert.* den. 291 U.S. 675); *Aberly* v. *Craven County*, 70 F. 2d 52 (4th Cir. 1934); *Ottenheimer Bros.* v. *Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), *cert.* den. 296 U.S. 582; *Mach* v. *Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), *cert.* den. 320 U.S. 773; *United States* v. *Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), *cert.* den. 344 U.S. 903 (1952); *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1938). Indeed the court of appeals for the Seventh Circuit had earlier so held. *Commissioner of Internal Revenue* v. *Kelly's Estate*, 84 F. 2d 958 (7th Cir., 1936), *cert.* den. 299 U.S. 603.

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* Cf. *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89 (1954).

While Petitioner had no standing to cross appeal, he had the right to urge in the court of appeals any matter in support of the trial court's judgment which he had relied on at the trial, including matter overlooked or ignored by the trial court. *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924); *Langnes* v. *Green*, 282 U.S. 531 (1931); *Anderson* v. *Atherton*, 302 U.S. 643 (1937); *Morley Constr. Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937); *Standard Accident Insurance Co.* v. *Roberts*, 132 F. 2d 794 (8th Cir., 1942). The appellate court may affirm a judgment of the district court even though based on grounds rejected by the lower court. *Lanova Corp.* v. *National Supply Co., supra; Century Distilling Co.* v. *Continental Distilling Co.*, 106 F. 2d 486 (3rd Cir., 1939). Since Respondent saw fit to appeal from the entire judgment the entire case was open in the court of appeals and the evidentiary rulings of the lower court could have been considered in the absence of a cross appeal. *Commercial National Bank in Shreveport* v. *Parsons*, 144 F. 2d 231 (5th Cir. 1944), *cert.* den. 323 U.S. 796 (1945).

Thus the court of appeals had the duty of considering the district court's ruling striking an admission by the Bankrupt that he had turned portions of money defrauded from Petitioner over to Respondent, even though Petitioner, the prevailing party below, had failed to, indeed could not, file a cross appeal. The appellate court has thus denied Petitioner his day in court and permits the Respondent to retain money fraudulently extracted from Petitioner which Bankrupt admitted he had delivered to Respondent to purchase his freedom.

The decision of the court below is in conflict with the above authorities, a conflict which should be resolved.

B. A Trustee's Duty Under a Turn-Over Order

This Court has reviewed the duty of trustees in bankruptcy under turn-over orders in relation to the bankrupt. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). Now presented is the duty of the Trustee to innocent third parties under such an order.

A turn-over order is a harsh remedy. Addressed to a debtor it means "pay up or go to jail." This is as drastic a coercive remedy as a bankruptcy court can invoke. And common knowledge tells us that a threat of imprisonment may cause a man to contravene moral or legal duties. The protection of innocent third parties requires that some duty be imposed on trustees in bankruptcy to examine title to assets received by them under the aegis of a turn-over order.

Because the power to issue a turn-over order is not statutory with defined limitations and because of its increasing use, the question here involved is of utmost importance in the administration of the Federal Bankruptcy Laws and should be reviewed by this Court.

The Bankrupt, Knetzer, was adjudged in contempt of court in July of 1949 for failure to turn over concealed assets to Respondent Trustee in Bankruptcy. It must be assumed that if he had sufficient assets to comply with the order, compliance would have been forthcoming. Instead, however, by means of the turn-over order, the Bankrupt was forced to purchase his freedom by bargaining for release from jail in return for delivering sums of money to the Trustee in Bankruptcy. In effect, the turn-over order was a form of judicial duress, forcing the Bankrupt to supply the Trustee with money if he wished to be a free man. That this duress led the Bankrupt to defraud innocent third

parties for funds necessary to obtain his freedom is not surprising. Because of the unusual nature of the turn-over order, and because of its compulsion on Bankrupt, there was a duty upon the Trustee in Bankruptcy to ascertain the source of the monies paid over to him by the Bankrupt.

The Trustee acquires no title to property acquired by the Bankrupt after his adjudication as such. 11 U.S.C. § 110. Nor is the Trustee an innocent purchaser. *Zartman* v. *First Nat. Bank*, 216 U.S. 134 (1910). Consequently the monies obtained from Petitioner, being after-acquired property, never vested in the Trustee. This fact, plus the coercion of the Bankrupt must compel the Trustee to ascertain the source of funds received. That a man will do more than commit fraud to avoid incarceration needs no citation. Turn-over orders must not be utilized to force a Bankrupt to perform criminal acts to the detriment of innocent third parties. Cf. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). In view of the Trustee's failure to comply with the duty upon him to ascertain the source of the monies paid him by the Bankrupt, Petitioner here, the defrauded third party, need not trace the funds into the Trustee's hands, but on the contrary, the burden must be placed upon the Trustee to demonstrate that he had reasonable cause to believe that the money handed him by the Bankrupt was in fact a portion of the concealed assets. The absence of even a token compliance with this duty is demonstrated. Particularly is this true where the money was received by the Trustee over a year subsequent to the entry of the turn-over order. Additionally the Trustee had notice from the Bankrupt's prior activities that he was not to be trusted. Cf. *Watchmaker* v. *Barnes*, 259 Fed. 783 (1st Cir. 1919). The

Trustee made no inquiry as to the source of the funds. His was the burden of making inquiry. 2 Scott on Trusts §§ 297, 476. If a reasonable inquiry would have disclosed the source and the fraud, he may not retain the funds obtained. If not, Petitioner would have to trace the funds into the hands of the Trustee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for *certiorari* should be granted.

Respectfully submitted,

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